U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0096 BLA
and 16-0097 BLA

CHARLENE HARGROVE (Widow of and o/b/o of CARL L. HARGROVE)[1]	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/15/2016
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Miner Benefits and Awarding

[1] Claimant is the deceased widow of the miner, Carl L. Hargrove, who died on April 7, 2014. Miner's Claim (MC) Director's Exhibit 6. Claimant was pursuing both the miner's claim and her survivor's claim at the time of her death on November 29, 2015. The Board acknowledged the filing of a Notice of Death of Claimant and Motion for Substitution of Claimant, wherein claimant's counsel stated claimant had died and that her daughter, Mrs. Carrie Griggs, who had been appointed executrix of the estate, is continuing to pursue both the miner's claim and the survivor's claim. *Hargrove v. Island Creek Coal Co.*, BRB Nos. 16-0096 BLA and 16-0097 BLA (Mar. 18, 2016) (unpub. Order).

Survivor Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Miner Benefits and Awarding Survivor Benefits (2013-BLA-05816 and 2014-BLA-05820) of Administrative Law Judge Colleen A. Geraghty, rendered on a miner's claim, filed on September 24, 2012, and a survivor's claim, filed on May 13, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] Based on the parties' stipulation and the evidence of record, the administrative law judge credited the miner with 27.27 years of coal mine employment, with at least fifteen of those years underground. The administrative law judge found that the evidence was sufficient to establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, claimant invoked the presumption set forth in Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further

[2] Employer's appeal in the miner's claim (2013-BLA-05816) was assigned BRB No. 16-0096 BLA, and its appeal in the survivor's claim (2014-BLA-05820) was assigned BRB No. 16-0097 BLA. By Order dated January 13, 2016, the Board consolidated these appeals for purposes of decision only. *Hargrove*, BRB Nos. 16-0096 BLA and 16-0097 BLA (Jan. 13, 2016) (unpub. Order).

[3] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an

determined that employer did not rebut the Section 411(c)(4) presumption and awarded benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 422(*l*), 30 U.S.C. §932(*l*).[4] Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that employer's contentions with respect to the administrative law judge's weighing of the CT scan evidence and medical opinions on rebuttal are without merit.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

The Miner's Claim

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underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[4] Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner had 27.27 years of coal mine employment, with at least fifteen years underground; the miner established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2); and the miner invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 6.

[6] The record reflects that the miner's last coal mine employment was in Kentucky. MC Director's Exhibits 2, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Once the presumption of total disability due to pneumoconiosis has been invoked, the burden shifts to the party opposing entitlement to affirmatively prove that the miner has neither legal nor clinical pneumoconiosis,[7] or that no part of the miner's total disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149 (2015) (Boggs, J., concurring and dissenting). In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Hippensteel and Castle that the miner had emphysema that was caused solely by his cigarette smoking.[8] Decision and Order at 28-29; Employer's Exhibits 8, 9, 11, 13. The administrative law judge concluded that their opinions were insufficient to establish rebuttal, as both physicians relied on premises that conflicted with the preamble to the 2001 regulatory revisions. Decision and Order at 28-29.

Employer argues that the administrative law judge erred in relying on the preamble to discredit the opinions of Drs. Hippensteel and Castle. Employer maintains that the administrative law judge improperly "fashioned a rule of law that physicians are unable to use certain parameters found in a non-binding discussion of some of the medical studies that the agency relied upon to promulgate the regulation that was to be adopted." Employer's Brief in Support of Petition for Review at 28. Employer's assertion of error is without merit.

It is well-established that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the resolution by the

[7] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] The administrative law judge also noted Dr. Chavda's opinion diagnosing legal pneumoconiosis, based on the presence of: emphysema; blood gas study evidence of hypoxia; symptoms of sputum production, wheezing, shortness of breath, hemoptysis, and cough; and the miner's twenty-six years of exposure to coal dust. MC Director's Exhibit 13; Claimant's Exhibit 6; Employer's Exhibit 12.

Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). In this case, the administrative law judge gave little weight to the opinions of Drs. Hippensteel and Castle because "they opined that [a] diagnosis of legal pneumoconiosis based on emphysema was unlikely because there were negative CT scans that did not reveal coal macules associated with coal worker's pneumoconiosis." Decision and Order at 28; Employer's Exhibits 8 at 8, 11 at 31, 13 at 19. The administrative law judge's finding was within her discretion, as she correctly observed that "the DOL in its preamble has specifically concluded that legal pneumoconiosis can occur 'regardless of the presence of clinical pneumoconiosis.'" Decision and Order at 28, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. In addition, the administrative law judge rationally determined that the opinions of Drs. Hippensteel and Castle that coal macules must be present for coal dust–induced emphysema conflicts with DOL's recognition that "coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 28, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Because the administrative law judge's discrediting of the opinions of employer's experts was rational and supported by substantial evidence, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 29. Consequently, we also affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[9] 20 C.F.R. §718.305(d)(1)(i); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

With respect to rebuttal of the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge rationally found that the opinions of Drs. Hippensteel and Castle were not entitled to any weight in light of her conclusion that the miner's emphysema, and the accompanying totally disabling respiratory impairment, constituted legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*,

[9] We need not consider employer's contentions that the administrative law judge erred in weighing the evidence regarding the existence of clinical pneumoconiosis. *See* Employer's Brief at 7-23. Because employer failed to disprove the existence of legal pneumoconiosis, employer cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

737 F.3d 1063, 1070, 25 BLR 2-431, 25 BLR 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); Decision and Order at 30-31. Consequently, we affirm her finding that employer failed to prove that no part of the miner's totally disabling impairment was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.[10] 20 C.F.R. §718.305(d)(1)(ii). We, therefore, affirm the administrative law judge's findings that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and that claimant is entitled to benefits in the miner's claim. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge correctly found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 422(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; and that her claim was pending on or after March 23, 2010. 30 U.S.C. §932(*l*); Decision and Order 32-33. Accordingly, we affirm the administrative law judge's finding that claimant is entitled to survivor's benefits under Section 932(*l*). *See Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[10] Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility determinations with respect to employer's evidence, we need not address employer's arguments regarding the weight accorded claimant's evidence, *i.e.*, the opinion of Dr. Chavda. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.

Accordingly, the administrative law judge's Decision and Order Awarding Miner Benefits and Awarding Survivor Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge